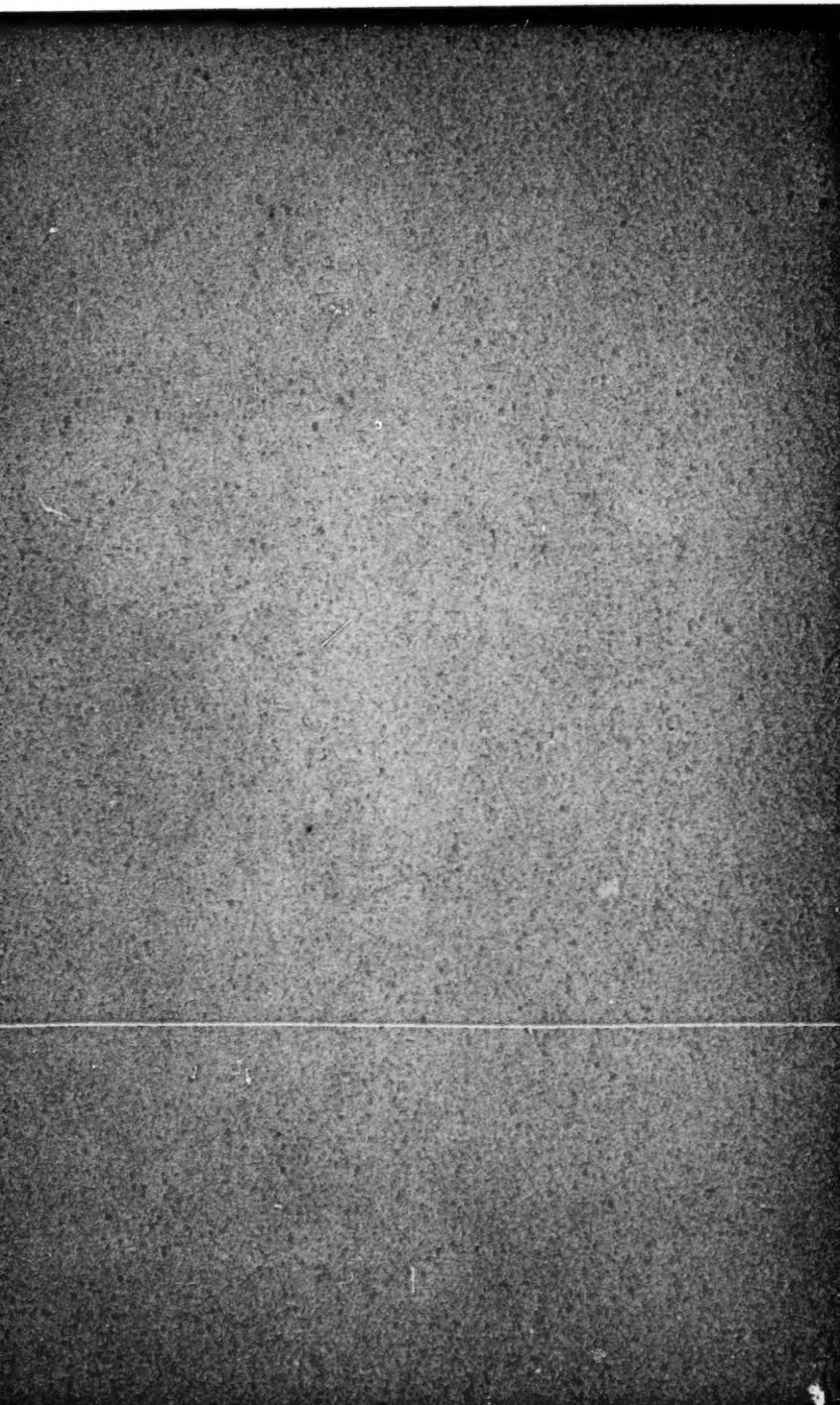

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SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

NO. 73-689

MICHAEL ANTHONY MANESS, *Petitioner*

versus

THE HONORABLE JAMES R. MEYERS, *Respondent*

On Writ of Certiorari to the 169th Judicial District Court of Bell County, Texas

MOTION AND APPLICATION FOR LEAVE TO APPEAR AS AMICUS CURIAE

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MOTION AND APPLICATION FOR LEAVE TO APPEAR AS AMICUS CURIAE

To The Honorable Judges Of The Supreme Court Of The United States Of America:

NOW COMES THE TEXAS CRIMINAL DEFENSE LAWYERS ASSOCIATION, by and through its designated representatives Marvin O. Teague, Malcolm Dade and Kerry P. Fitzgerald, and presents this Motion and Application for Leave of Court to Make Appearance in the captioned cause in the capacity as Amicus Curiae, pursuant to Rule 42, Rules of the Supreme Court, and, for grounds and reasons therefor, the said Texas Criminal Defense Lawyers Association would respectfully show unto the Court the following:

INTEREST OF THE AMICUS CURIAE

The Texas Criminal Defense Lawyers Association, hereinafter referred to as the "Association," is composed of more than 1,000 licensed Attorneys at Law who are actively engaged in the practice of criminal law in the State of Texas. The Petitioner, MICHAEL ANTHONY MANESS, is a member in good standing of the Association. The day-by-day conduct of the members' profession involves every stage and facet of the entire process of criminal justice in both State and Federal Courts, from the lowest inferior Court in the State system to the highest and Supreme Court of the Federal system. The main issue presented in this Cause, concerning the Petitioner, MICHAEL ANTHONY MANESS, namely, whether an Attorney at Law, in the representation of his client, acting in good faith may properly advise his client to invoke and assert the rights and privileges of self-incrimination provided by the Fifth Amendment to the Constitution of the United States of America, as made applicable to the States through the Fourteenth Amendment to the Constitution of the United States of America, is of such grave importance to each member of the "Association" as it will dominate in the future such professional consideration and advice, in a given factual situation, that the members of the Association as a whole may give to their respective clients in the future.

The "Association" supports the position of the Petitioner, MICHAEL ANTHONY MANESS, seeking relief from the Judgment of Contempt, entered by the Presiding Judge of the 169th Judicial District Court of Bell County, Texas, and its position is that a licensed Attorney at Law may, acting in the best interests of the client and of professional consideration, give such neces-

sary legal advice to the client, in good faith, without fear that the Attorney's independence will be chilled by the possibility that he will be summarily punished if the legal advice given later proves to be incorrect; albeit how sincere and in good faith it was initially given.

WHEREFORE, PREMISES CONSIDERED, the Texas Criminal Defense Lawyers Association, being herein represented by the aforesaid named persons, respectfully requests permission of the Court to appear as Amicus Curiae in the above entitled and numbered cause, to file its brief, and, should the Court see fit, to present oral argument to the Court upon the aforesaid hearing of said cause.

Respectfully submitted,

TEXAS CRIMINAL DEFENSE LAWYERS ASSOCIATION

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BRIEF FOR THE AMICUS CURIAE TEXAS CRIMINAL DEFENSE LAWYERS ASSOCIATION

THE OPINION BELOW

No formal written opinion was filed by the Court below in support of the judgment of criminal contempt entered against the Petitioner.

JURISDICTION

The judgment of criminal contempt against the Petitioner, dated September 28, 1973 and entered of record on October 1, 1973, is reproduced in Appendix A of the Petitioner's petition for certiorari at pages 27-29. The orders of the Court of Criminal Appeals of Texas and the Supreme Court of Texas denying the Petitioner's original applications for habeas corpus relief on October 11, 1973 are reproduced in Appendix B and Appendix C of the Petitioner's petition for certiorari at pages 33 and 34. The filing of the petition on October 24, 1973 was timely under Rule 22(1) of the Court.

Because the contempt judgment entered by the Respondent against the Petitioner is not subject to review in any higher Texas court, the case is within the Court's certiorari jurisdiction conferred by 28 U.S.C. § 1257(3). *Stanford v. Texas,* 379 U.S. 476, 480 (1965); *Thompson v. City of Louisville,* 362 U.S. 199, 202-03, 80 S.Ct. 624, 4 L.Ed.2d 654 (1960).

QUESTIONS PRESENTED

1. Whether the Fifth Amendment privilege against self-incrimination may properly be invoked to resist compliance with a subpoena duces tecum demanding a potentially self-incriminatory production of magazines that previously have been displayed for commercial distribution.

2. Whether an attorney may be held in contempt of court:

(a) for giving legal advice to a client involving Federal constitutional rights;

(b) in good faith and in the exercise of his professional judgment—whether right or wrong;

(c) without contumacious conduct or disrespect to the Judge; and

(d) when the client has no legal means to test the Judge's difference with his attorney's advice other than by following that advice, subject to being held in contempt himself if the advice is later held to be wrong.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Petitioner's Federal constitutional claims implicate the Fifth Amendment privilege against self-incrimination, the Sixth Amendment right to effective assistance of counsel, the Ninth Amendment residuum of individual substantive rights and the Fourteenth Amendment guarantee of due process of law.

The relevant provisions of the Constitution of the United States, the Texas obscenity statute (Article 527 of the Texas Penal Code) and contempt statute (Article 1911a of the Revised Civil Statutes of Texas) and an obscenity ordinance enacted by the City of Temple, Texas on October 19, 1972, are reproduced in Appendix A of Petitioner's brief at pages 61-68.

STATEMENT OF FACTS OF THE CASE

The facts of the case, as set forth by Hon. Jack Roberts, United States District Court, Western District of Texas, Waco Division, in *Maley v. Meyers,* Civil Action No. W-73-CA-87, July 11, 1973, Opinion Unreported, see. however, Appendix C, Brief for the Petitioner, at page 74, adequately states the events leading to the Petition for Writ of Certiorari by Petitioner.

There, Judge Roberts said:

> In early 1973, the City of Temple filed a civil proceeding to enjoin McKelva from distributing some 52 allegedly obscene magazines. The City issued a subopena duces tecum directing McKelva to produce the 52 magazines for trial. While the injunction proceeding was, of course, civil in nature, McKelva would be subject to criminal prosecution under Article 527 of the Texas Penal Code upon a showing that the magazines he had exhibited and distributed were "obscene" within the meaning of that article. The question of the magazines' "obscenity" was likewise the critical issue in the injunction proceeding. At the injunction hearing, McKelva announced that he did not have five of the magazines, and filed a motion to quash the subpoena as to the remaining 47 publications. The motion was overruled by the trial judge, The Honorable J. F. Clawson of the 169th Judicial District Court of Bell County, who directed McKelva to produce the magazines within three hours.
>
> When the court reconvened three hours later, McKelva announced that he would not produce the magazines upon the advice of counsel that his right against self incrimination would be endangered by production of the evidence. Thereupon, Judge Clawson found McKelva in contempt for refusing to obey the subpoena and found his lawyers including Petitioner, guilty of contempt for advising and counseling McKelva not to obey the subpoena. Petitioner invoked his right, as an officer of the court, under TEX. REV. CIV. STAT. ANN., art. 1911a (2) (c), to be tried by a judge of a district court other than the offended court. Respondent was duly appointed for that purpose by the presiding judge of the Third Administrative Judicial District. Petitioner was subsequently tried before Judge Meyers and found guilty

> of contempt. A $500 fine was assessed as punishment.

The conduct of the Petitioner, in acting as attorney for McKelva, as pointed out by the Petitioner in his brief, during all of the proceedings before the first trial judge, as well as his personal appearance before the second trial judge, reflects a record devoid of any effort by Petitioner to use the legal advice he gave to McKelva "as a transparent shield for the obstruction of justice."

> On the record the Petitioner's good faith is unassailable, and there is not the slightest evidence of the contumacious intent that has traditionally been regarded as essential to the imposition of a valid judgment of criminal contempt. (p. 53 of Brief of Petitioner). The entire record uniformly reflects that throughout the course of the proceedings neither the lawyers nor the Court manifested on any occasion the slightest animosity, anger or discourtesy but, on the contrary, consistently displayed toward each other an undisturbed and uninterrupted attitude of respectful [professional] intellectual equality. (p. 17 of Brief of Petitioner).

Thus, the Record of this Cause is unlike that found in the "infamous" Chicago Seven [Sic] Trial, see *The Conspiracy Trial*, nor as that found in such cases as *Illinois v. Allen*, 397 U.S. 337, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970). See also *Mayberry v. Pennsylvania*, 400 U.S. 455, 91 S.Ct. 499, 27 L.Ed.2d 532 (1971); In re Dellinger, 461 F.2d 389 (7th Cir. 1972); and *United States v. Seale*, 461 F.2d 345 (7th Cir. 1972). Even after adjudging the Petitioner and his Co-Counsel guilty of contempt of court and remanding them to jail, the first trial judge said, concerning the preparation of any necessary

papers by Petitioner in order to comply with Art. 1911a. V.A.T.C.S.: "And you may have access to my library if you desire." (App. 33).

Though the Record of this Cause leaves much to be desired, in the way of facts, the following should not be questioned:

1. Mike McKelva, a client of Petitioner who is and was a licensed Atttorney at Law, had prior to the lawsuit made the basis of this lawsuit, been charged, tried and convicted by the City of Temple, Texas, for selling allegedly obscene matter, See p. 78 of the Brief of the Petitioner, and, at the time of the lawsuit, the basis from which the contempt citation against Petitioner arose, these cases were on appeal *de novo* to the County Court of Bell County, Texas. See Art. 45.10, V.A.T.C.C.P.
2. Apparently, the magazines used in the Municipal Court cases were introduced into evidence at the lawsuit made the basis of the contempt citation against Petitioner. (App. 9). The trial court found, in the injunction suit, the seven (7) magazines, introduced into evidence, "Obscene" and also found that "by admission of Counsel the forty-seven named publications in the subpoena duces tecum are also obscene as that term is defined by the State law and the City Ordinance." (p. 28 of Appendix of Petitioner's Brief.)
3. The client McKelva was served during the injunction trial with a subpoena to bring forty-seven (47) designated magazines to Court. (App. p. 3 contains a list of fifty-two (52), but, by agreement, five (5) of these were deleted).
4. A Motion to Quash the Subpoena was filed, heard and overruled by the trial judge in the Injunction suit. (App. p. 15).

5. After being called as a witness by the City Attorney, McKelva acknowledged being served with the subpoena, but refused to bring the listed magazines to Court "solely because I believe that the production of such magazines would entail a substantial possibility of self-incrimination." (App. 23).

6. The trial court, thereupon, held McKelva in contempt of Court, assessed his punishment at ten (10) days confinement in the Bell County, Texas jail, together with a fine of $200.00. McKelva was confined, but after serving seven (7) days, he was given three (3) days credit, with the fine being remitted by the Trial Court, and then Ordered Released. (App. 2).

The issue and rights involving either the owner, custodian, possessor, etc., of printed articles sought to be subpoenaed, are not directly in this Petition for Certiorari. *Cf. Couch vs. United States,* 409 U.S. 322, 93 St.Ct. 611, 34 L.Ed.2d 548 (1973). However, there should be no question that the client, McKelva, and the reason he was held in contempt of court are involved indirectly in this lawsuit. Compare, however, the Annotation, "Right of Member, Officer, Agent, or Director of Private Corporation or Unincorporated Association to Assert Personal Privilege Against Self-Incrimination with Respect to Production of Corporate Books or Records," Vol. 52, 3rd Series, *American Law Reports,* 1973, commencing at page 636; the Annotation, "Privilege Against Self-Incrimination as Ground for Refusal to Produce Noncorporate Documents in Possession of Person Asserting Privilege but Owned by Another," Vol. 37, 3rd Series, *American Law Reports,* commencing at page 1373; the Annotation, "Privilege Against Self-Incrimination as Justification for

Refusal to Comply with Order or Subpoena requiring Production of Books or Documents of Private Corporation," Vol. 120, 1st Series, *American Law Reports,* 1939, commencing at page 1102; and the Annotation, "Privilege of Defendant in Contempt Proceeding as to Testifying Against Himself". Vol. 54, 1st Series, *American Law Reports,* 1928, commencing at page 1436.

As to the Petitioner, Michael Anthony Maness, one of the Attorneys who represented the defendant McKelva, the following should not be questioned.

1. He was in the lawsuit on the City's application for an injunction in the capacity as an Attorney at Law for McKelva. Another attorney, Maley, was co-counsel.
2. He presented the arguments on the Motion to Quash the Subpoena. He argued that:
   a. McKelva was not the owner of the magazines.
   b. The magazines sought dealt "explicitly with acts of a sexual nature."
   c. If McKelva were ordered to bring the magazines to Court, there was "a substantial possibility of self-incrimination."
   d. McKelva had previously been convicted for the sale of seven magazines "not named in the subpoena, but the character of the magazines that are named in the subpoena is such that a compulsory production of these publications would entail the same possibility of self-incrimination."
   e. If the magazines were produced by the client McKelva, "criminal prosecutions are not only a very definite possibility, they are in fact a pronounced possibility."

f. The satisfaction of the subpoena, by McKelva, would "incriminate himself."

g. The satisfaction of the subpoena, by McKelva, "perhaps quite probably would be used in the future as a basis for a criminal prosecution."

h. The City of Temple, if they had probable cause, could secure a search warrant for the magazines.

i. He constantly argued the provisions of the Fifth Amendment as being applicable to what the City of Temple desired to do. "It is very clear under these circumstances that this subpoena must be quashed because to require anyone to produce these sort of magazines, and that is regardless of the nature of the proceeding, would violate their [sic] Fifth Amendment rights."

The Contempt of Court Judgment of the trial court against Petitioner is, unquestionably, predicated upon the fact the trial court felt Petitioner had denied the trial court the opportunity to have access to the magazines. (App. 31). "I have found you in contempt because you have usurped the authority of this Court." (App. 31). "You are simply saying to the Court that because Counsel thinks that this is inadmissible evidence that it will not be subject to a subpoena under the power of this Court." (App. 32). Punishment assessed Petitioner, as well as his Co-Counsel, was ten (10) days' confinement and a fine of $200.00. (App. 32).

At the "new hearing", pursuant to Article 1911a, V.A.T.C.S., at which hearing only what had ocurred before the original trial judge was presented, opposing

Counsel *argued* that Petitioner and his Co-Counsel had been held in contempt of court "because their contempt is based upon the question *of actually advising the witness* not to fulfill the lawful order of the Court." (App. 37). (Emphasis italicized). The then trial judge stated into the Record: "I am dubious that materials displayed for public sale are Fifth Amendment protected, *but I think it is a very close point.*" (App. 38). (Emphasis italicized). That trial judge interpreted the Record, made before the original trial judge, to mean that Petitioner, as well as Co-Counsel, "advised [McKelva] to disobey the subpoena." (App. 39). Then trial counsel's interpretation and argument that Petitioner and his Co-Counsel had advised McKelva that if he produced the magazines, he [McKelva] would possibly be incriminating himself (App. 39), was not acceptable, as the then trial judge, who held the second contempt hearing, found both Petitioner and his Co-Counsel, Maley, guilty of contempt, and assessed their punishments at a fine of $500.00 for each of them without any confinement being assessed.

The Injunction suit was subsequently appealed to the Court of Civil Appeals sitting in Austin, Travis County, Texas, but, by Motion of the respective parties, McKelva and the City of Temple, Texas, the cause was remanded back to the original trial court as "all matters in controversy have been settled and that it is necessary to remand this case to the trial court for further disposition and for entry of the agreed final judgment." What the final judgment is or was to be entered is not known as same is not set out in the opinion of the Court of Civil Appeals. See *McKelva et al., v. The City of Temple,* (Tex. Civ. App. 1974), 506 S.W.2d 260.

INTRODUCTORY COMMENT

Subject, of course, to the final decision of this Honorable Court and any other legal remedies that may be available to Petitioner, if the trial court's Judgment of Contempt is upheld, then Petitioner must pay the $500.00 fine assessed against him or go to jail. However, the grave consequences facing Petitioner, as an Attorney at Law, are more than a mere $500.00 fine. As Circuit Judge Rives of the Fifth Circuit Court of Appeals recently observed in the case of *In re Butts,* 1974, 493 F.2d 842, which case also involved another Texas Attorney:

> Butts' conviction for contempt presumably could be used for impeachment and sentencing purposes in any future criminal proceeding. This conviction would be especially damaging if Butts were ever again accused of being in contempt of court. Conviction for contempt of court could also have serious adverse career consequences for Butts. His conviction could provide a basis for disciplinary action by a bar association. Opportunities for appointment to the bench or to other high office might be foreclosed as a result of this blot upon his record. The conviction might damage Butts' reputation in the legal community, and this in turn might affect his ability to attract clients and to represent them effectively, especially in open court. (844).

That, of course, is what is in store for Petitioner individually. However, the issues raised in his Petition for Certiorari are of such grave consequence to every licensed practicing Attorney in these United States, there should be no question of the importance of the decision to be rendered by this Honorable Court to the individual practicing members of the Bar.

SUMMARY

The question presented in this cause is totally unique in that it involves the right of a client to assert his constitutional right against self-incrimination, the right and duty of Petitioner as the attorney, to advise and counsel the client with respect to the client's personal assertion of his Fifth Amendment rights under the United States Constitution, and the rights and duties of Petitioner as attorney and counselor to render the effective asistance of counsel as guaranteed by the Sixth Amendment of the United States Constitution.

The record is clear that the trial court believed that Petitioner's legal advice constituted a usurpation of the authority of the trial court and that the Petitioner was, in effect, judging for himself what was and what was not admissible evidence at the injunction hearing. The trial court also found that because of certain remarks made by Petitioner, that Petitioner and his client had, in effect, stipulated and the trial court could therefore find the forty-seven (47) books in question to be obscene.

It is submitted that the action, conduct and advice of Petitioner, acting in his capacity as legal counsel for the client, were entirely proper, reasonable, ethical and responsible.

It is further submitted that the judgment of contempt against Petitioner violates Petitioner's rights to due process of law and prevents Petitioner from effectively representing his client under the particular facts and circumstances of the case.

As already recounted, a lower court had already judged four magazines to be obscene, which judgment was

on appeal at the time of the injunction hearing. The City of Temple chose to invoke the injunction procedure available in Section 13 of Article 527 of the Texas Penal Code rather than invoke the provisions of Section 9 which provided for ample notice and hearing prior to a determination of obscenity. It is noteworthy that Section 13 has been omitted from the new penal code, effective in Texas January 1, 1974.

The statutes in the State of Texas do not define what is specifically meant by contempt of court, except in certain instances unrelated to this case. See *In re Norton*, 1946, Supreme Court of Texas, 191 S.W.2d, 713. In general, a person who perpetrates acts done in disrespect of the court or its process or obstructs the adminstration of justice is guilty of contempt of court. The purpose of a criminal contempt citation, as in the case at bar, is strictly punitive. *Crow v. State*, 1859, Supreme Court of Texas, 24 Tex. 12.

In the case at bar, Petitioner made it clear to the trial court that he had advised his client to invoke the Fifth Amendment as the production of the magazines in question might tend to incriminate him. At no time did Petitioner advise his client or inform the court that the magazines, as a matter of fact or as a matter of law, were admissible as evidence. Quite to the contrary, Petitioner advised his client to invoke the Fifth Amendment to challenge the manner used in this case to bring the magazines into Court and introduce them into evidence.

QUESTIONS PRESENTED

1. Whether the Fifth Amendment privilege against self-incrimination may properly be invoked to resist compliance with a subpoena duces tecum demand-

ing a potentially self-incriminatory production of magazines that previously have been displayed for commercial distribution.

2. Whether an attorney may be held in contempt of court:

(a) for giving legal advice to a client involving Federal Constitutional rights;

(b) in good faith and in the exercise of his professional judgment—whether right or wrong;

(c) without contumacious conduct or disrespect to the Judge; and

(d) when the client has no legal means to test the Judge's difference with his attorney's advice other than by following that advice, subject to being held in contempt himself if the advice is later held to be wrong.

The original Judgment of Contempt provided, excluding the formal introductory and concluding statements:

On this the 2nd day of February, 1973, came on to be considered the matter of the refusal of the Defendant Michael McKelva to obey the subpoena heretofore issued out of this court commanding him to bring into court certain matter listed in said subpoena:

And the Court having heard the statement of Counsel and the testimony of said Defendant McKelva admitting in open Court to having willfully and knowingly refused to comply with said subpoena duces tecum and their reasons for so refusing being considered without merit, finds that the defendant Michael McKelva and his Attorneys, Karl Maley

and Michael Anthony Maness are all and each of them in contempt of this Court, the Defendant for failing and refusing to obey the subpoena duces tecum issued out of this Court on the 24th day of January, 1973, and his Attorneys for advising and counseling the said Defendant to disobey said subpoena; and the said Defendant and each of his said Attorneys are ordered punished for said contempt by confinement in the Bell County Jail for a term of ten (10) days and payment of a fine of Two Hundred ($200.00) Dollars.

It is therefore Ordered that the Sheriff of Bell County take into custody the said Michael McKelva, Karl Maley and Michael Anthony Maness, and confine them and each of them until they shall have each served ten days from February 1, 1973 at 10:50 A.M. and paid their fines of Two Hundred Dollars each.

The said Karl Maley and Michael Anthony Maness having filed and presented their motion under Article 1911 R.C.S. of the Statutes of Texas, are released on their personal recognizance pending hearing hereon in accordance with said article.

The subsequent Judgment of Contempt, entered after hearing was held pursuant to Art. 1911a, V.A.T.C.S., provides:

BE IT REMEMBERED that on the 11th day of May, 1973, at Belton, Texas, the undersigned judge, Honorable James R. Meyers, sitting by designation in the above styled and numbered cause, conducted an evidentiary hearing, in accordance with Article 1911a, Tex.Rev.Civ.Stats., to review an order of the Honorable J. F. Clawson, entered in open court on February 2, 1973, which order found guilty of contempt of court Karl A. Maley and Michael Anthony Maness, officers of the Court, and which order fur-

ther assessed the punishment for each contemnor at 10 days confinement in the Bell County Jail and a fine of $200.00.

The Court having considered the entire record in this cause of action, it is ORDERED that the finding of guilty entered by Judge Clawson against the said Mr. Maley and Mr. Maness be, and they are hereby, affirmed; and it is further ORDERED, in lieu of the punishment assessed by Judge Clawson, that the said Karl A. Maley be, and he is hereby, assessed the following punishment: a fine of $500.00, to be paid to the District Clerk, 169th Judicial District, at or before 12 noon, October 12, 1973; and it is further ORDERED, in lieu of the punishment assessed by Judge Clawson, that the said Michael Anthony Maness be, and he is hereby, assessed the following punishment: a fine of $500.00, to be paid to the District Clerk, 169th Judicial District, at or before 12 noon, October 12, 1973.

Art. 1911a, V.A.T.C.S., provides:

Section 1. A court possesses inherently all powers necessary for the exercise of its jurisdiction and the enforcement of its lawful orders, including authority to issue such writs and orders as may be necessary or proper in aid of its jurisdiction. It has the duty to require that proceeding shall be conducted with dignity and in an orderly and expeditious manner and to so control the proceedings that justice is done. A court has the power to punish for contempt.

Sec. 2. (a) Every court other than a justice court or municipal court may punish by a fine of not more than $500, or by confinement in the county jail for not more than six months, or both, any person guilty of contempt of the court.

(b) A justice court or municipal court may punish by a fine of not more than $100, or by confinement in the county or city jail for not more than

three days, or both, any person guilty of contempt of the court.

(c) Provided, however, an officer of a court held in contempt by a trial court, shall, upon proper motion filed in the offended court, be released upon his own personal recognizance pending a determination of his guilt or innocence by a judge of a district court, other than the offended court. Said judge to be appointed for that purpose by the presiding judge of the Administrative Judicial District wherein the alleged contempt occurred.

Sec. 3. Nothing in this Act affects a court's power to confine a contemner in order to compel him to obey a court order.

Acts 1971, 62nd Leg., p. 2535, ch. 831, §§ 1-3 eff. August 30, 1971. Sec. 2 amended by Acts 1973, 63rd Leg., p. 1784, ch. 657, § 1, eff. Aug. 27, 1973.

"Many of us erroneously tend to identify defense lawyers with their clients. Defense lawyers themselves sometimes make the mistake of depreciating their role. Rather, those who represent deviants should paraphrase Milton's words in *On His Blindness,* "They also serve who only stand and wait," and say to themselves, "They also serve who only represent the deviant." The deviants are the care and responsibility of us all; but most of us prefer to pass them by, to walk on the other side of the street. Not so, those who defend them. They act, in a sense, as good Samaritans. The deviant needs a friend. He has at least one, his lawyer, who helps both him and the rest of us to arrive at manageable solutions. Defense lawyers, in representing their clients, can also act as peacemakers, thereby filling a great need. There are also intangible rewards, as defense counsel will have an opportunity to study at first hand the fears and hates of human beings." *Model Trials, American Jurisprudence,* Volume 10, "Obscenity Litigation," by O. John Rogge, Section 31, page 112.

DISCUSSION, ARGUMENT AND AUTHORITIES

There should be no question that the general rule, which provides a witness [McKelva] in a civil or criminal case to be protected by the Constitution of the United States from being compelled to incriminate himself, is present in this case.

In *Couch v. United States,* 409 U.S. 322, 93 S.Ct. 611, 34 L.Ed.2d 548 (1973), Mr. Justice Powell, speaking and writing for a Majority of the Court, in the factual situation which presented the question of the right of an owner of certain business records to invoke the Fifth Amendment privilege against self-incrimination, where those records were not in the possession of the owner but in the possession of the owner's accountant, who had in turn delivered the documents to the owner's attorney, held that the owner did not have the right to invoke the provisions of the Fifth Amendment and had no legal right to preclude the Government from obtaining possession of the documents sought by the Government.

His Honor, however, said:

> ". . . The importance of preserving inviolate the privilege against compulsory self-incrimination has often been stated by this Court and need not be elaborated. *Counselman v. Hitchcock,* 142 U.S. 547 (1892); *Malloy v. Hogan,* 378 U.S. 1 (1964); *Miranda v. Arizona,* 384 U.S. 436 (1966). By its very nature, the privilege is an intimate and personal one. It respects a private inner sanctum of individual feeling and thought and proscribes state intrusion to extract self-condemnation. Historically, the privilege sprang from an abhorrence of governmental assault against the single individual accused of crime and the temptation on the part of the State to resort to

the expedient of compelling incriminating evidence from one's own mouth. *United States v. White*, 322 U.S. 694, 698 (1944). The Court has thought the privilege necessary to prevent any "recurrence of the Inquisition and the Star Chamber, even if not in their stark brutality." *Ullman v. United States*, 350 U.S. 422, 428 (1956).

In *Murphy v. Waterfront Commission*, 378 U.S. 52, 55 (1964), the Court articulated the policies and purposes of the privilege:

> '. . . our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates 'a fair state-individual balance by requiring the government . . . in its contest with the individual to shoulder the entire load." . . . our respect for the inviolability of the human personality and of the right of each individual 'to a private enclave where he may lead a private life," . . .'

It is important to reiterate that the Fifth Amendment privilege is a *personal privileges* it adheres basically to the person, not to information which may incriminate him. As Mr. Justice Holmes put it: "A party is privileged from producing the evidence but not from its production." *Johnson v. United States*, 228 U.S. 457, 458 (1913). The Constitution explicitly prohibits compelling an accused to bear witness "against himself": it necessarily did not proscribe incriminating statements elicited from another. Compulsion upon the person asserting it is an important element of the privilege, and "prohibition of compelling a man . . . to be witness against himself is a prohibition of the use of physical or moral compul-

sion to extort communication from *him*," *Holt v. United States*, 218 U.S. 245, 252-253 (1910) (Emphasis added). It is extortion of information from the accused himself that offends our sense of justice. . . .

. . . Inquisitorial pressure or coercion against a potentially accused person, compelling her, against her will, to utter self-condemning words or produce incriminating documents is absent. . . .

. . . Petitioner's reliance on *Boyd v. United States*, 116 U.S. 616 (1886), is misplaced. In Boyd, the person asserting the privilege was in possession of the written statements in question. The Court in Boyd did hold that "any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime," violated the Fourth and Fifth Amendments. 116 U.S. 630. That case did not, however, address or contemplate the divergence of ownership and possession, and petitioner concedes that court decisions applying Boyd have largely been in instances where possession and ownership conjoined, see e.g., *Hill v. Philpott*, 445 F.2d 144 (C.A. 7, 1971); *U. S. v. Judson*, 63-2 USTC 9658 (C.A. 9, 1963). In Boyd, the production order was directed against the owner of the property who, by responding, would have been forced "to produce and authenticate any personal documents or effects that might incriminate him," *United States v. White*, *supra*, at 698. But again we reiterate that in the instant case there was no enforced communication of any kind from any accused or potential accused. . . ."

Mr. Justice Douglas, in his dissent, said:

". . . The decision today sanctions yet another tool of the ever-widening governmental invasion and oversight of our private lives. As I urged in dissent in

Warden v. Hayden, 387 U.S. 294, 325, without the right of privacy 'the Fourth Amendment and the Fifth are ready instruments for the police state that the Framers sought to avoid.'

By looking solely to the historical antecedents of the privilege and focusing on "the ingredient of personal compulsion," the majority largely ignores the interplay of the fundamental values protected by the Fourth and Fifth Amendments. As early as 1885 the Court recognized that issues often cannot be pigeonholed within one amendment or the other, thereby foreclosing consideration of related policies. *Boyd v. United States*, 116 U.S. 616. In dealing with the compulsory production of a private paper for use in a forfeiture proceeding, the Court stated:

> 'The principles laid down [in *Entick v. Carrington*] affect the very essence of constitutional liberty and security. . . . [T]hey apply to all invasions, on the part of the Government and its employees, of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors and the rummaging of his drawers that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offense; . . . Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods is within the condemnation of that judgment. In this regard the Fourth and Fifth Amendments run almost into each other.' Id., at 630.

Although the subpoena in Boyd was directed at the person asserting the privilege, that fact cannot

be allowed to obscure the basic thrust of the Court's reasoning: the Fourth and Fifth Amendments delineate a "sphere of privacy" which must be protected against governmental intrusion. We confirmed in *Murphy v. Waterfront Commission*, 378 U.S. 52, 55, that "our respect for the inviolability of the human personality and of the right of each individual 'to a private enclave where he may lead a private life' " is a fundamental policy underlying the Fifth Amendment.

The majority contends, however, that petitioner cannot reasonably claim "an expectation of protected privacy or confidentiality." The reasons asserted for this position overlook the nature of the accountant-client relationship. The accountant, an agent for a specified purpose—i.e., completing the petitioner's tax returns—bore certain fiduciary responsibilities to petitioner. One of those responsibilities was not to use the records given him for any purpose other than completing the returns. Under these circumstances it hardly can be said that by giving the records to the accountant, the petitioner committed them to the public domain.

I defined what I believe to be the boundaries of this right to privacy in *Warden v. Hayden*, supra, at 323:

'The constitutional philosophy is, I think, clear. The personal effects and possessions of the individual (all contraband and the like excepted) are sacrosanct from prying eyes, from the long arm of the law, from any rummaging by police. Privacy involves the choice of individual to disclose or to reveal what he believes, what he thinks, what he possesses. The article may be a non-descript work of art, a manuscript of a book, a personal account book, a diary, invoices, personal clothing, jewelry, or whatnot. Those who wrote the Bill of Rights believed that every individual needs both to com-

municate with others and to keep his affairs to himself. That dual aspect of privacy means that the individual should have the freedom to select for himself the time and circumstances when he will share his secrets with others and decide the extent of the sharing.'

The majority, by the seeming implications of its opinion, has cleared the way for investigatory authorities to compel disclosure of facets of our life we heretofore considered sacrosanct. We are told that "situations may well arise where the relinquishment of possession is so temporary and insignificant as to leave personal compulsions upon the accused substantially intact." I can see no basis in the majority opinion, however, for stopping short of condemning only those intrusions resting on compulsory process against the author of the thoughts or documents. Are we now to encourage meddling by the government and ever more ingenious methods of obtaining access to sought after materials? The premium now will be on subterfuge, on bypassing the master of the domain by spiriting the materials away or compelling disclosure by a trusted employee or confidant. Inevitably, this will lead those of us who cherish our privacy to refrain from recording our thoughts or trusting anyone with even temporary custody of documents we want to protect from public disclosure. In short, it will stultify the exchange of ideas that we have considered crucial to our democracy.

The decision may have a more immediate impact which the majority does not consider. Our tax laws have become so complex that very few taxpayers can afford the luxury of completing their own returns without professional assistance. If a taxpayer now wants to insure the confidentiality and privacy of his records, however, he must forego such assistance. To my mind, the majority thus attaches a penalty to the exercise of the privilege against self-incrimination. It

calls for little more discussion than to note that we have not tolerated such penalties in the past. *Cf. Uniformed Sanitation Men Association v. Commissioner of Sanitation*, 392 U.S. 580; *Gardner v. Broderick*, 392 U.S. 273.

Thus, I would reverse the decision below, finding that the subpoena violated both petitioner's Fourth and Fifth Amendment rights. I offer one more observation. The majority cautions that respect for our constitutional principles is eroded "when they leap their proper bounds." We should not be swayed by the popular cry for a formalistic and narrow interpretation of those provisions which safeguard our fundamental rights.

It is a Constitution we are construing not a legislative-judicial code of conduct that suits our private value choices or that satisfies the appetite of prosecutors for more and more short cuts that avoid constitutional barriers. Those constitutional barriers and the judicial traditions supporting them are the sources of the privacy we value so greatly. That privacy "protects people," not places, under the Fourth Amendment. *Katz v. United States*, 389 U.S. 347, 353. And as already noted *Boyd v. United States*, supra, held that when it comes to the "forcible and compulsory extortion of a man's own testimony or his private papers to be used as evidence to convict him of crime or to forfeit his goods"—that is an illustration of the manner in which "the Fourth and Fifth Amendments run almost into each other." 116 U.S., at 630.

One's privacy embraces what the person has in his home, his desk, his files, his safe as well as what he carries on his person. It also has a very meaningful relationship to what he tells any confidant—his wife, his minister, his lawyer, or his tax accountant. The constitutional fences of law are broken down by an

ever-increasingly powerful government that seeks to reduce every person to a digit. . . ."

Mr. Justice Marshall, in his dissent, said:

". . . I agree, of course, that possession does not define the limits of the protection which the Constitution affords to private papers, and add these comments to indicate how I would treat claims like petitioner's.

A. I begin with *Boyd v. United States*, 116 U.S. 616 (1886), whose continuing vitality is indicated by the majority's effort to distinguish it. That was a suit for the forfeiture of 35 cases of plate glass alleged to have been illegally imported. In the course of the forfeiture proceeding, the Government introduced into evidence an invoice of a prior shipment. The defendants objected on the ground that the use of the invoice violated their rights under the Fourth and Fifth Amendments, because the invoice was a private paper secured by a subpoena. This Court found a violation of both amendments.

One might interpret Boyd as holding that the Fifth Amendment prohibits the use of private papers in a criminal proceeding over the author's objection. The words of the Fifth Amendment surely can be read in that way. The use of the papers over objection "compel[s the author] in [a] criminal case to be a witness against himself." The compulsion occurs when the paper is introduced over objection, not when the paper is written or subpoenaed.

But that interpretation has not been adopted by this Court. See, e.g., *Perlman v. United States*, 247 U.S. 7 (1918); *Johnson v. United States*, 228 U.S. 457 (1913). And in some possible cases, consistent application of that interpretation of Boyd might lead to results at odds with common sense.

Another interpretation of Boyd has been accepted by this Court and by the leading commentators. See, e.g., *Curcio v. United States*, 354 U.S. 118, 125 (1957); 8 Wigmore, Evidence § 2264 (McNaughton rev. 1961); McCormick, Evidence §§ 126-127 (2d ed. 1972). When a party produces potentially incriminating evidence in response to a summons or subpoena, he implicitly testifies that the evidence he brings forth is in fact the evidence demanded. "The custodian's act of producing books or records in response to a subpoena duces tecum is itself a representation that the documents produced are those demanded by the subpoena. Requiring the custodian to identify or authenticate the document for admission in evidence merely makes explicit what is implicit in the production itself." *Curcio v. United States*, 354 U.S., at 125.

The potential for incrimination inherent in the act of production is illustrated by this case. The summons here called for the production of "all books . . . pertaining to the tax liability of" petitioner. Had the summons been directed to her, she would have implicitly testified, on producing some papers, that these were "all" the records sought. The Internal Revenue agents believed that she may have understated her income. Their belief might have been confirmed on examining all of her records, but not on examining only some of them. The records could then be used in a subsequent criminal prosecution for underreporting her income. If she produced only some of her books, though, she would be liable for contempt of the order. The Fifth Amendment was designed to prevent the Government from placing potential defendants in such a position. *Cf. Murphy v. Waterfront Commission*, 378 U.S. 52, 55 (1964).

These considerations operate only against the person in possession of the papers, as the majority correctly points out. In this case, the accountant to

whom the summons was directed has made no claim that turning over the records he has, might incriminate him, for example, by exposing him to the charge that he had perjured himself in representing that the return prepared for petitioner was correct to the best of his knowledge and belief, 26 U.S.C. § 6065 (1970), or that he had knowingly aided in the preparation of a false return, 26 U.S.C. § 7206 (2) (1970). Nor could he be held to have represented more than that he had produced all the records in his possession.

However, the accepted interpretation of Boyd has an odd sound to it. Boyd emphasized that the invoice there was a private paper written by the defendants. Yet the accepted interpretation of the case makes the authorship and contents of the paper largely irrelevant. What is incriminating about the production of a document in response to an order is not its contents, as one might have thought, but the implicit authentication that the document is the one named in the order. If that is the only way rationally to interpret Boyd, it might make sense to do so. But it makes better sense to devise a rationale which focuses on the obvious concern of the case, the desire of the author of documents to keep them private.

B. This Court also held in Boyd that the Fourth Amendment was violated. Indeed, much of the opinion is devoted to a discussion of *Entick v. Carrington*, 19 How. St. Tr. 1029, a landmark in the development of the prohibition against unreasonable searches and seizures. Here too the doctrinal basis of the holding is unclear, in part because the Court correctly perceived that "[i]n this regard the Fourth and Fifth Amendments run almost into each other." 116 U.S., at 630.

Boyd suggested that the Fourth Amendment prohibited the seizure of "mere evidence." 116 U.S., at 623-624. See *Gouled v. United States*, 255 U.S. 298

(1921). Searches for mere evidence were unreasonable even if such a search was sure to produce evidence leading to a conviction. The precise contours of the "mere evidence" rule were shaped by concepts of property law which we now see as outmoded. See *Warden v. Hayden*, 387 U.S. 294, 303-307 (1967). But those concepts attempted to define, however imprecisely, a sphere of personal privacy which the Government could not enter over objection. See, e.g., *Gouled v. United States*, 255 U.S., at 304. And when this Court repudiated the "mere evidence" rule, it suggested that Fourth Amendment limitations might be devised precisely in terms of the interest in privacy, prohibiting the seizure of "items of evidential value whose very nature precludes them from being the object of a reasonable search and seizure." *Warden v. Hayden*, 387 U.S., at 303. *Cf. Stanford v. Texas*, 379 U.S. 476, 485 (1965).

The Fourth and Fifth Amendments do not speak to totally unrelated concerns. *Cf. Griswold v. Connecticut*, 381 U.S. 479, 484-485 (1965); *Murphy v. Waterfront Commission*, 378 U.S., at 55. Both involve aspects of a person's right to develop for himself a sphere of personal privacy. Where the Amendments "run almost into each other," I would prohibit the Government from entering. The problem, as I see it, is to develop criteria for determining whether evidence sought by the Government lies within the sphere of activities which petitioner attempted to keep private. *Cf. Katz v. United States*, 389 U.S. 347, 351-352 (1967).

The first criterion, as Hayden suggests, is the nature of the evidence. Diaries and personal letters which record only their author's personal thoughts lie at the heart of our sense of privacy. In contrast, I see no bar in the Fourth or Fifth Amendments to the seizure of a letter from one conspirator to another directing the recipient to take steps which further the

> conspiracy. Business records like those sought in this case lie between those cases. We are not so outraged by the intrusion on privacy which accompanies the seizure of these records as we are by the seizure of a diary, yet the records could not easily be called 'instrumentalities' of tax evasion, particularly if they are accurate. . . ."

This Honorable Court is indeed fortunate. It is rarely, if ever, as here, where an individual has presented a case to any Court, based upon the fact that he was adjudged to be guilty of contempt of Court for giving bad advice to a client and that advice is later judicially determined to have been legally commendable advice. Cf. *United States v. Jorn*, 400 U.S. 470, 91 S.Ct. 547 (558-559), 27 L.Ed.2d 543 (1971).

No case has been found by the Attorneys representing the Amicus Curiae where an Attorney has been jailed for only giving legal advice to a client. It is submitted that none exist or, hopefully, but for this case, will ever exist. Compare, however, *Ex parte McDonald,* 1969, Tex. Cr. App., 477 S.W.2d 938.

In this Cause, there should be no question that, initially the trial court had jurisdiction over the City of Temple's application for an injunction. See Arts. 4642, V.A.T.C.S., and 4667, V.A.T.C.S., and Art. 527, Sec. 13, V.A.T.P.C. There should also be no question that a District Court in the State of Texas has the power to issue a subpoena duces tecum for certain documents, if they exist. See Rule 177a, V.A.T.R.C.P.

There should also be no question that an Attorney at Law may not, without running the risk of Contempt of Court, bring about or cause an impediment to legal and valid Court Orders. "Even incorrect court orders must

ordinarily be obeyed until set aside." See *United States v. Dickinson*, 465 F.2d 496 (5th Cir. 1972); and *U. S. v. Seale*, 461 F.2d 345 (7th Cir. 1972).

However, the issuance and return of a subpoena duces tecum, it is submitted, in certain cases, as here, may run head on into the provisions of the Fourth and Fifth Amendments to the Constitution of the United States of America.

The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fifth Amendment provides:

> No person shall be held to answer for a capital or other infamous crime unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

If there is a confrontation, without more being present than here, the subpoena must fail as against the individual's Constitutional rights.

Can it be intelligently argued that if McKelva had obeyed the subpoena duces tecum and brought the magazines to Court, showed, displayed or turned them over to the Court and the City Attorney that he would not have been subsequently criminally prosecuted? No type immunity was either offered or granted to McKelva; either blanket type or limited type immunity.

Though a question of semantics may be present, from this Record, can it be other than accepted that where the client has been prosecuted for possessing or selling like items sought to be obtained by a subpoena duces tecum, that any Attorney at Law would do other than advise the client that if he brings the documents to court that not only may they be used to prosecute the client but in all probability will be used to prosecute the client in a future criminal action? Especially, after the trial court, without ever seeing the magazines, found them to be "obscene," thus doing what the highest criminal court of the State of Texas has said could not be done in order to sustain a like criminal accusation. Eg. *Bryers v. State*, 1972, Tex. Cr. App., 480 S.W.2d 712, and cases cited therein; and Hill v. State, 1972, Tex. Cr. App., 479 S.W.2d 288, and cases cited therein.

Unquestionably, conflicts between the Fifth Amendment and the right of trial Courts to subpoena certain documents are inevitably going to occur in this day and age. Here, McKelva was given a Court Order, subpoena duces tecum, to bring certain documents to Court. He consulted with Petitioner regarding this. What advice Petitioner, or Co-Counsel, Maley, gave McKelva is, from this Record, unknown. However, apparently, the advice was nothing more than: "If you bring the documents to Court, you will possibly incriminate yourself and possibly subject

yourself to future criminal prosecution." The client chose to exercise his right of self-incrimination and was held in contempt of court for exercising that right. The only relation of Petitioner to the exercise of that right by McKelva, by this Record, was that the client, McKelva, testified, in answer to questions whether he had the magazines, whether he had the magazines in his possession when served with the subpoena, and whether he brought the magazines to Court, that he was refusing to answer the questions "under [sic] the advice of Counsel . . . [and] on the grounds that it [the answer] may tend to incriminate me." (App. 18).

After being given an opportunity to get the magazines, McKelva testified he had made no effort to get the magazines, was aware of the Court order to get them, and refused to get them and bring them to Court. (App. 22). He was refusing, however, because he believed that the bringing of the magazines to Court "would entail a substantial possibility of self-incrimination." (App. 23).

Petitioner, in his Brief, admits he advised McKelva "to avoid the risk of involuntarily surrendering his rights under the Fifth Amendment by refusing to produce the magazines, after first explaining to his client the available legal alternatives involved and the possible legal consequences that might have resulted from adopting any one of them." (Brief at Page 14).

After making its findings, concerning the injunction suit, the trial court, sua sponte, found Petitioner and Attorney Maley guilty of Contempt. (App. 29).

Again, it was McKelva, the client, who invoked the Fifth Amendment; it was McKelva, the client, who refused to honor the subpoena duces tecum of the Court;

it was McKelva, the client, who refused to bring the magazines to Court; and it was McKelva, the client, who steadfastly refused to give up what he thought was his right of self-incrimination under the Constitution of the United States of America. IT WAS NOT THE PETITIONER OR HIS CO-COUNSEL WHO DID THESE THINGS; IT WAS NOT THE PETITIONER OR HIS CO-COUNSEL WHO PREVENTED THE COURT FROM SEEING THE MAGAZINES; IT WAS NOT THE PETITIONER OR HIS CO-COUNSEL WHO FRUSTRATED THE COURT'S ACCESS TO THE MAGAZINES; IT WAS NOT THE PETITIONER OR HIS CO-COUNSEL WHO DECIDED TO FOREGO A MOTION TO SUPPRESS; IT WAS NOT THE PETITIONER OR HIS CO-COUNSEL WHO DECIDED TO WAIVE MAKING AN OBJECTION TO THE POSSIBLE ADMISSIBILITY OF THE MAGAZINES DURING THE HEARING ON THE APPLICATION FOR AN INJUNCTION; AND IT WAS NOT THE PETITIONER OR HIS CO-COUNSEL WHO DETERMINED THAT THE MAGAZINES WERE NOT SUBJECT TO THE SUBPOENA DUCES TECUM.

IT WAS McKELVA, THE CLIENT, WHO DID THESE THINGS. PETITIONER AND HIS CO-COUNSEL, MALEY, MERELY ADVISED THE CLIENT WHAT WOULD POSSIBLY OCCUR IF McKELVA DID OBEY THE SUBPOENA DUCES TECUM. Is this contemptuous conduct?

Can it ever be suggested that if the State of Texas well believes that a person is guilty of a criminal wrong, that it is the person's Attorney's obligation to advise the client that he must come forward and confess his guilt? Cf. *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23

L.Ed2d 274 (1969); *Powell v. Alabama,* 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932); and *Avery v. Alabama,* 308 U.S. 444, 60 S.Ct. 321, 84 L.Ed. 337 (1940). That, it is submitted, appears to be what the Respondent argues.

In short, there is not a scintilla of evidence in this Record that Petitioner or his Co-Counsel, Maley, did other than advise the client, McKelva, as to the *consequences* if McKelva refused to obey the subpoena duces tecum issued by the trial Court.

For what other purpose does one have an Attorney except to obtain legal advice? For otherwise, "The first thing we do, let's kill all the lawyers." William Shakespeare, "King Henry VI, Part IV."

McKelva received the legal advice, via Petitioner, to which he is presumptively guaranteed to receive by the Sixth Amendment to the Constitution of the United States. It was McKelva's decision to accept or reject it. He chose the former.

Unfortunately, there is no right of appeal in the State of Texas from a trial court's overruling of a motion to quash a subpoena duces tecum and the refusal to testify. See Vol. 61, *Tex. Jur.* 2d, "Witnesses", Sec. 32, pages 565-566. There is also, in the State of Texas, no legal recourse, save and except the Great Writ, to test the validity of a judgment of contempt. See *Taylor v. Nagle,* (Tex. Civ. App. 1967), 412 S.W.2d 812. Thus, it should not be questioned that McKelva was advised that if he did not give up his right of self-incrimination "to jail he would probably go." Apparently, McKelva, the client, was willing to accept the judgment of the trial Court rather than purge himself as he stayed in jail seven of the ten days assessed against him, at which time he was

ordered released. No continuing confinement Order was entered that McKelva was to remain confined until he delivered the magazines into Court. There was no offer by McKelva, after having his punishment assessed or while serving his punishment, nor was there an offer from the trial court that if McKelva then complied with the subpoena duces tecum the contempt judgment would be set aside; merely that McKelva was assessed a certain time and fine as his punishment.

In short, there is nothing in this Record to reflect that the decision to refuse to respond to the subpoena duces tecum was anyone's but McKelva. Petitioner has conceded he advised McKelva of the consequences of his act if he did not respond to the subpoena. It was McKelva, not Petitioner, who frustrated the trial court's not seeing the later to be adjudicated "obscene" magazines.

It matters not that this was a civil proceeding held pursuant to a municipality's application for an injunction. See *McCarthy v. Arndstein,* 266 U.S. 34, 69 L.Ed. 158, 45 S.Ct. 16 (1924); *Ex parte Scott,* Supreme Court of Texas, (1939), 133 Tex. 1, 123 S.W.2d 306; and *McCrone v. United States,* 370 U.S. 61, 64, 83 L.Ed. 1108, 1110, 59 S.Ct. 685 (1939).

Only the client, McKelva, could invoke the privilege against self-incrimination. Also, again, McKelva was not offered either transactional or use immunity. See *United States v. Calandra,* 410 U.S. 925, 35 L.Ed. 585, 93 Sup.Ct. 1357 (1974).

In fact, if McKelva had, contrary to the advice given him by Petitioner and Co-Counsel, Maley, decided not to invoke the Fifth Amendment provisions and not voice his right of self-incrimination, but had done the opposite,

neither Petitioner nor Maley nor the both of them could have objected as the right of self- incrimination, being a personal and individual right, could not have been invoked by or on behalf of McKelva by Petitioner or his Co-Counsel, Maley.

It is not known, by this Record, where the magazines were kept or were located, either when the subpoena duces tecum was issued, served, or when McKelva was interrogated by the City Attorney or the Trial Judge. The subpoena was directed to McKelva, "who resides at 526 Wolf, Killeen, Bell County, Texas." (App. 2). The newsstand operated by McKelva was located at 118-A South First Street in Temple, Texas. (App. 17). There is nothing to show these particular magazines were ever displayed to the public. Cf. *Stanley v. Georgia,* 394 U.S. 557, 22 L.Ed.2d 542, 89 S.Ct. 1243 (1969). There can be little doubt the Constitutional privilege of self-incrimination also extends to printed or pictorial matter belonging to an individual. Compare *Silverthorne Lumber Company v. United States,* 251 U.S. 385, 64 L.Ed 319, 40 Sup.Ct. 182 (1920); and *Anderson v. Coulter,* 499 P.2d 103 (Ariz. 1972), Cert. denied, 410 U.S. 990, 93 S.Ct. 208 (1972).

What McKelva should or should not have done is really not the question. Was he or was he not entitled to invoke the provisions of the Fifth Amendment is also really not the question; although, if the rights of Petitioner are derivative rights, it may be.

The question is simply, it is submitted, whether or not the mere giving of legal advice to a client, without more, which is accepted by the client, can ever constitute contemptuous conduct on the part of an Attorney? It is respectfully submitted that it cannot be and must never be.

Here, the legal advice given by Petitioner concerned the applicability of the Fifth Amendment to the Constitution of the United States of America. The next case may involve another of our great Amendments. The next case may not even involve any of the Amendments. Where will the line be drawn if this appeal is denied and the case affirmed?

The right to Counsel, as guaranteed by the Sixth Amendment to the Constitution of these United States, made applicable to the States by the Fourteenth Amendment, See *Pointer v. Texas,* 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965), is, of course, one of the great rights we all have; for, without such right, many of our other Constitutional rights would be meaningless. See also *Coleman v. Alabama,* 399 U.S. 1, 90 S.Ct. 1999, 26 L.Ed2d 387 (1970); *Escobedo v. Illinois,* 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977 (1964); *Gideon v. Wainright,* 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed2d 799 (1963); *Douglas v. California,* 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963); *In re Gault,* 387 U.S. 1, 87 S.Ct. 1438, 18 L.Ed.2d 527 (1967); *Mempa v. Rhay,* 389 U.S. 128, 88 S.Ct. 254, 19 L.Ed.2d 336 (1967). *This Constitutional right is not simply a right to the assistance of an Attorney at Law, but the right to have the effective assistance of Counsel. More than a warm body is mandated.* (Emphasis italicized). See *Avery v. Alabama,* 308 U.S. 444, 60 S.Ct. 321, 84 L.Ed. 337 (1940); *Powell v. Alabama,* 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed 158 (1932); *Entsminger v. Iowa,* 386 U.S. 748, 87 S.Ct. 1402, 18 L.Ed.2d 501 (1967); and *Anders v. California,* 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967). Texas lawyers have usually pursued their client's Constitutional rights with vigor. See, for example, the cases of

Webb v. Texas, 409 U.S. 95, 34 L.Ed.2d 330, 93 S.Ct. 351 (1972); *Loper v. Beto,* 405 U.S. 473, 31 L.Ed.2d 374, 92 S.Ct. 1014 (1972); *Burgett v. Texas,* 389 U.S. 109, 19 L.Ed2d 319, 88 S.Ct. 258 (1967); *Pointer v. Texas,* 380 U.S. 400, 13 L.Ed2d 923, 85 S.Ct. 1065 (1965); *Greer v. Beto,* 384 U.S. 269, 16 L.Ed.2d 526, 86 S.Ct. 1447 (1966); *Branch v. Texas,* 408 U.S. 238, U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). Reh. Denied, 409 U.S. 902, 93 L.Ed.2d 164; *Aguilar v. Texas,* 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964); *Estes v. Texas,* 381 U.S. 532, 85 S.Ct. 1628, 14 L.Ed.2d 543 (1965), Reh. Denied, 382 U.S. 875, 86 S.Ct. 18, 15 L.Ed.2d 118. *Stanford v. Texas,* 379 U.S. 476, 389, 85 S.Ct. 506, 13 L.Ed.2d 431 (1965); *Clewis v. Texas,* 386 U.S. 707, 87 S.Ct. 1338, 18 L.Ed.2d 423 (1967); *Giordenello v. U. S.,* 394, 310, 357 U.S. 489, 78 S.Ct. 1245, 2 L.Ed.2d 1503 (1958); *Leary v. U. S.,* 395 U.S. 6, 89 S.Ct. 1532, 23 L.Ed.2d 57 (1967); *Orozco v. Texas,* 394 U.S. 324, 89 S.Ct. 1095, 22 L.Ed.2d 311 (1969); *Smith v. Hooey,* 393 U.S. 374, 89 S.Ct. 575, 21 L.Ed.2d 609 (1969); *Gunn v. University Committee to End the War in Viet Nam,* 399 U.S. 383, 90 S.Ct. 2013, 26 L.Ed.2d 684 (1970); *Schacht v. U. S.,* 398 U.S. 58, 90 S.Ct. 1555, 26 L.Ed.2d 44, (1970); and *Washington v. Texas,* 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967).

However, to fetter this right, by making the mere giving of legal advice, per se, contemptuous conduct, will not only make this a hollow and meaningless right, but will, in fact, render that right impotent.

In this Cause, by this Record, what is sought, by the Respondent, is, it is submitted, a finding that the mere

giving of legal advice, per se, is contemptuous conduct where the client accepts the advice, makes his own decision, invokes the self-incrimination clause of the Fifth Amendment to the Constitution of the United States of America, thereby bringing about a frustration of a Court Order in the nature of a subpoena duces tecum. In this, the Respondent should not prevail.

The vice of upholding the Respondent in this Cause lies in the fact that the role of an Attorney at Law will forever be destroyed, for a client to hereafter seek legal advice will be chilled because of fear by the Attorney, in the giving of legal advice, that if he gives the client competent, good faith legal advice, "to jail he, too, may go." The history of the Sixth Amendment to the Constitution abhors the idea, much less the thought that such could occur in these United States, much less in the great State of Texas. "We should not be swayed by the popular cry for a formalistic and narrow interpretation of those provisions which safeguard our fundamental rights." Mr. Justice Douglas, dissenting, in *Couch v. United States,* supra.

The plea here, by the Amicus Curiae, is not that an Attorney at Law is immune from any regulation, by a person or entity, in the practice of law or even in the giving of legal advice to a client. Cf. *Associated Press v. National Labor Relations Board,* 301 U.S. 103, 57 S.Ct. 650, 81 L.Ed. 953 (1937); and *Oklahoma Press Pub. Co. v. Walling,* 327 U.S. 186, 90 L.Ed. 614, 66 S.Ct. 494 (1946).

If a Grand Jury can override a Fifth Amendment claim of a witness only if the witness is granted immunity coextensive with the privilege against self-incrimination, see

Kastigar v. United States, 406 U.S. 441, 92 S.Ct. 1653, 32 L.Ed.2d 212 (1972), then how can a trial judge of the State of Texas override the Fifth Amendment claim of a witness where there is no grant of immunity of any kind? If a Grand Jury cannot compel a person to produce private books and papers that would incriminate him. See *Boyd v. United States,* 116 U.S. 616, 6 S.Ct. 524, 29 L.Ed. 746 (1886), how can a trial court judge of the State of Texas do otherwise? This case, of course, is not the factual situation where a Grand Jury witness desires to invoke the exclusionary rule. Cf. *U. S. v. Calandra,* 414 U.S. 338, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974). However, if a Grand Jury's subpoena power is limited, is a Texas trial court's subpoena power also not limited? See *U. S. v. Calandra,* supra.

U. S. v. Calandra, supra, involved a claim of a violation of the Fourth, as well as the Fifth, Amendment to the Constitution of the United States. The only contention raised by this Petitioner is the applicability of the Fifth and Sixth Amendments to his case.

However, is the question that may be overlooked in this cause not: "For what purpose was the magazines sought?" By this Record, it is patently clear the seeking of the magazines was not an act without meaning as, upon production, in light of what previously had occurred, the witness McKelva, through this predicate, would have become amenable to further and future criminal prosecution. The frustration of consummating the subpoena did not deter, nor could it, under State law, the granting of the application for an injunction or the enforcement of the injunction if and when granted. By the Record, the injunction, against the forty-seven (47) subpoena magazines, was placed into effect. If it were the desire of the

City of Temple to get these specific magazines "off the streets" of Temple, Texas, that objective was accomplished. The overriding of the Fifth Amendment rights of McKelva was truly incidental to what was sought unless, as shown by implication from this Record on Appeal, the City Attorney and the trial judge were attempting to do what even a Grand Jury may not do. See *U. S. v. Calandra, supra.*

Perhaps, Mr. McKelva merely adopted the age old addage that one may beat the rap [the prospective and ever looming future criminal accusation] but not necessarily the ride. Can it not be argued that he decided it best to serve a contempt punishment rather than to face the prospect of another criminal accusation? The maximum punishment for contempt of Court, under Art. 1911a, V.A.T.C.S., is a mere six (6) months' confinement and a $500.00 fine, together with court costs. The maximum punishment for violating Art. 527, V.A.T.P.C., then in effect, first offender, was by fine not exceeding $10,000.00 and six (6) months in jail, together with court costs. If a second offender, the person was to be punished as a felon, if found guilty, with his punishment not to exceed a fine of $25,000.00 and punishment in the penitentiary not to exceed five (5) years. Except for the prosecution by the City, from this Record, it is unknown what McKelva's past transgressions of the law, if any, were or may have been.

The contempt judgment against McKelva was, of course, predicated upon the fact that McKelva did not honor the subpoena duces tecum by not bringing the magazines to Court. The subpoena, See App. 2-4, provided for McKelva *to appear and testify* as well as "bring with him and produce, at the time and place aforesaid,

certain magazines . . ." and he [was to] continue his attendance from day to day and from term to term, until discharged by the court *or by the said William T. Wilson* [the City Attorney]. (Emphasis italicized).

The contempt was not predicated upon the fact of non-appearance.

Of course, it is difficult to see how the questions asked by the City Attorney could, per se, be incriminating. (See App. 17-18), (App. 22). The "incrimination" here would have occurred only if the magazines had been produced; not whether he had them. The trial judge so held: "Mr. McKelva, you have been adjudged to be in contempt of this Court for having failed to observe a subpoena duces tecum to bring certain matters with you as a witness." (App. 27).

Again, however, what difference does this really make to this lawsuit? The judgment of contempt before this Honorable Court is not McKelva's, but the Petitioner's. "I have found you [the Petitioner] in contempt because you have usurped the authority of the Court." (App. 31).

If the rights of Petitioner, as to the giving of legal advice to the client, McKelva, are dependent or derivative of the rights of the client, McKelva, as provided by the Fourth, Fifth and Sixth Amendments, as made applicable to the States through the Fourteenth, then, of course, it is not only important that McKelva's rights be discussed and considered, but the end result to be reached could possibly be determinative of the decision to be reached if that is the approach one took; i.e., if the Attorney advises the client and it is later determined that the advice encompassed the invocation of the Constitution of the United States, or certain parts thereof, and the client did

invoke same, based on that legal advice, whatever it may have been, but it turns out that the client did not, in fact, have any legal right to invoke, does this make a difference? It is respectfully submitted it should not as the issue here is whether or not the mere giving of legal advice to a client, which advice was given in good faith, which advice was accepted by the client and used by the client in invoking provisions of the Constitution, is sufficient to ever constitute contemptuous conduct or to support a judgment of contempt of court.

Is there a difference between the factual context in the two cases of *U. S. v. Dionisio,* 410 U.S. 1, 93 St.Ct. 764, 35 L.Ed.2d 67 (1973), and *Mara v. U. S.,* 410 U.S. 19, 93 S.Ct. 774, 35 L.Ed.2d 99 (1973), and this one? The only real difference is there a Grand Jury issued a subpoena for a witness to bring his body and his voice or his hand to Court and give a voice exemplar and/or a handwriting and printing exemplar. Here, the subpoena directed McKelva to bring certain documents and testify.

However, it appears that in light of what the Court has said in the two cases cited that the legal advice of Petitioner was also sound advice, as this type seizure, whether it be by a Grand Jury or otherwise, would not be legal, where the client has exercised his rights under the Fifth Amendment to the Constitution.

In *U. S. v. Dionisio,* 410 U.S. 1, 93 S.Ct. 764, 35 L.Ed.2d (1973), the majority of the Court, speaking through Mr. Justice Stewart, considered the applicability of the Fourth Amendment to a Grand Jury seeking to obtain voice exemplars from a witness' voice, "*not for the testimonial or communicative content of what was to be said.*" Thus, there were no Fourth Amendment rights violated.

The Court said, however:

> This is not to say that a grand jury subpoena is some talisman that dissolves all constitutional protections. The grand jury cannot require a witness to testify against himself. It cannot require the production by a person of private books and records that would incriminate him. See *Boyd vs. United States*, 116 U.S. 616, 633-635. The Fourth Amendment provides protection against a grand jury subpoena duces tecum too sweeping in its terms "to be regarded as reasonable." *Hale v. Henkel*, 201 U.S. 43, 76; cf. *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 208, 217. And last Term, in the context of a First Amendment claim, we indicated that the Constitution could not tolerate the transformation of the grand jury into an instrument of oppression: "Official harassment of the press undertaken not for purposes of law enforcement but to disrupt a reporter's relationship with his news sources would have no justification. Grand juries are subject to judicial control and subpoenas to motion to quash. . . .

In *U. S. v. Mara* a/k/a Marasovich, 410 U.S. 19, 93 S.Ct. 774, 35 L.Ed. 2d 99 (1973), the Court reversed a lower court decision which had struck down a subpoena issued to a witness for him to produce handwriting and printing exemplars. The Court held this did not constitute an unreasonable search and seizure.

Mr. Justice Marshall, in dissenting in Mara, supra, said:

> . . . Like Davis, the present cases involve official investigatory seizures which interfere with personal liberty. The Court considers dispositive, however, the fact that the seizures were effected by the grand jury, rather than the police. I cannot agree.
>
> First, in *Hale v. Henkel*, 201 U.S. 43, 76 (1906), the Court held that a subpoena duces tecum order-

ing "the production of books and papers [before a grand jury] may constitute an unreasonable search and seizure within the Fourth Amendment," and on the particular facts of the case, it concluded that the subpoena was "far to sweeping in its term to be regarded as reasonable." Considered alone, Hale would certainly seem to carry a strong implication that a subpoena compelling an individual's personal appearance before a grand jury, like a subpoena ordering the production of private papers, is subject to the Fourth Amendment standard of reasonableness. The protection of the Fourth Amendment is not, after all, limited to personal "papers," but extends also to "persons," "houses," and "effects." It would seem a strange hierarchy of constitutional values that would afford papers more protection from arbitrary governmental intrusion than people . . .

. . . In short, history, at least insofar as heretofore reflected in this Court's cases, does not necessarily establish an obligation to appear before a grand jury for other than testimonial purposes. See *Branzburg v. Hayes*, 408 U.S. 665 (1972); *Ullmann v. United States*, 350 U.S. 422, 439 n. 15 (1956); *Piemonte v. United States*, 367 U.S. 556, 559 n. 2 (1961); *Wilson v. United States*, 221 U.S. 361, 372 (1911); *Hale v. Henkel*, 201 U.S., at 65. See also *United States v. Bryan*, 339 U.S. 323, 331 (1950); *Brown v. Walker*, 161 U.S. 591, 600 (1896); *Garland v. Torre*, 259 F.2d 545, 549 (C.A. 2), cert. denied, 358 U.S. 910 (1958). . . .

. . . . In approaching these questions, we must keep in mind that "[t]his Court has consistently asserted that the rights of privacy and personal security protected by the Fourth Amendment '. . . are to be regarded as of the very essence of constitutional liberty . . .' " *Harris v. United States*, 331 U.S. 145, 150 (1947). As a rule, the Amendment stands as an essential bulwark against arbitrary and unreasonable

governmental intrusion—*Camara v. Municipal Court*, 387 U.S. 523 (1967)—upon the privacy and liberty of the individual, see, e.g., *Terry v. Ohio*, 392 U.S. 1, 9 (1968); *Jones v. United States*, 362 U.S. 257, 261 (1960). Given the central role of the Fourth Amendment in our scheme of constitutional liberty, we should not casually assume that governmental action which may result in interference with individual liberty is expected from its requirements. Cf. *Coolidge v. New Hampshire*, 403 U.S. 347, 357 (1971); *Katz v. United States*, 389 U.S. 347, 357 (1967); *Camara v. Municipal Court*, 387 U.S., at 528-529. The reason for any exception to the coverage of the Amendment must be fully understood and the limits of the exception should be defined accordingly. To do otherwise would create a danger of turning the exception into the rule and lead to the "impeachment of the rights for the protection" of which [the Amendment] was adopted." *Go-Bart Importing Co. v. United States*, 282, U.S. 344, 357 (1931); cf. *Grau v. United States*, 287 U.S. 124, 128 (1932). . . .

. . . Individuals called to testify before the grand jury will have available their Fifth Amendment privilege against self-incrimination. Thus, at least insofar as incriminating information, is sought directly from a particular criminal suspect, the grand jury process would not appear to offer law enforcement officials a substantial advantage over ordinary investigative techniques.

But when we move beyond the realm of a grand jury investigation limited to testimonial inquiries, as the Court does today, the danger increases that law enforcement officials may seek to usurp the grand jury process for the purpose of securing incriminating evidence from a particular suspect through the simple expedient of a subpoena. In view of the Court's Fourth Amendment analysis of the respondents' expectations of privacy concerning their hand-

writing and voice exemplars and in view of the testimonial evidence limitation on the reach of the Fifth Amendment privilege, there is essentially no objection to be made once a suspect is before the grand jury and exemplars are requested. Thus, if the Grand Jury may summon criminal suspects for such purposes without complying with the Fourth Amendment, it will obviously present an attractive investigative tool to prosecutor and police. For what law enforcement officers could not accomplish directly themselves after our decision in *Davis v. Mississippi*, they may now accomplish indirectly through the grand jury process. . . .

. . . Consistent with the Court's decision in *Hale v. Henkel*, it ruled only that the request for physical evidence such as exemplars should be subject to a showing of reasonableness. See 201 U.S., at 76. This "reasonableness" requirement has previously been explained by this Court, albeit in a somewhat different context, to require a showing by the Government that: (1) "the investigation is authorized by Congress"; (2) the investigation "is for a purpose Congress can order"; (3) the evidence sought is "relevant"; and (4) the request is "adequate, but not excessive, for the purposes of the relevant inquiry." See *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 209 (1946). This was the interpretation of the "reasonableness" requirement properly adopted by the Court of Appeals. See 454 F.2d 580, 584-585. And, in elaborating on the requirement that the request not be "excessive" it added that the Government would bear the burden of showing that it was not conducting "a mere general fishing expedition under grand jury sponsorship" I.d., at 585 . . .

Therefore, the type procedure involved here, of the State (City) issuing a subpoena duces tecum for a witness to bring to Court certain possibly incriminatory magazines,

where the State or Government has not shown a reasonable right thereto, is violative of the provisions of the Fourth Amendment to the Constitution of the United States. Further, to require a witness to bring to Court certain possibly incriminatory magazines, if the witness felt that to either identify the magazines, testify concerning the magazines, etc., this would incriminate himself, then, without some form of immunity being granted, the witness should be able to invoke his rights to self-incrimination under the Fifth Amendment.

The compulsion, in honoring the subpoena duces tecum, is the compulsory production of magazines. Cf. *Boyd v. United States,* supra. The testimonial compulsion present here, as to McKelva, would be in the realm of identification of the magazines. There is no showing by this Record that *these* magazines were ever exposed to the public.

To uphold this action, as to McKelva, would, of course, stretch what Mr. Justice Douglas said in his dissent one more peg.

> . . . The tendency is for government to use shortcuts in its search for instruments more susceptible to its manipulations then was the historic grand jury . . .

Also:

> . . . The determination as to whether a contempt has been committed does not depend on the intention of the offending party, but on the act which he has done . . . See Edward M. Dangel, *Contempt,* at page 179, Section 409.

Here, the contempt of McKelva was the refusal to honor the subpoena duces tecum. For what was the contempt of Petitioner other than the giving of legal advice

which has been now judicially determined to be sound legal advice?

Nor, should it be claimed that the action of McKelva forever precluded the State from seizing the magazines. In *Bryers v. State,* Tex.Cr.App., 489 S.W.2d 712, 719, where the Court of Criminal Appeals of Texas struck down a conviction because the Court did not have the entire film of the allegedly "obscene" movie before it, the Court said:

> . . . And a vigorous enforcement of these laws in the area of motion pictures [magazines] is not inconsistent with the evidentiary rule here announced. In response to the action of the courts Sec. 9 of Article 527, supra, has been reenacted with substantial modifications which detail the procedure to be followed in seizing a film or other allegedly obscene material with a search warrant . . .
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> . . . Nor is the criminal process the only remedy available to the State. Article 527, Section 13 authorizes injunctive proceedings, and the section has been held unconstitutional, *State v. Scott,* 460 S.W.2d 103 (Tex. 1970), and has recently been effectively utilized to enjoin the sale of obscene films. *More v. State,* 470 S.W.2d 391 (Tex.Civ.App. San Antonio 1971, writ ref'd n.r.e.). . . .

Thus, in the State of Texas, the State has two (2) remedies available for seizing allegedly "obscene" material and getting it off the streets. One method is through the application of the Penal Statutes, See then Arts. 527 and 534b., V.A.P.C., (Cf. the New Texas Penal Code, Art. 43.23, effective January 1, 1974). Another method is through the application for an injunction. See Art. 4667, V.A.T.C.S. However, if the seizure of the particular mat-

ter is sought, under the criminal statute, then it was necessary to seek a search warrant duces tecum. Art. 527, Sec. 9, Sub-section(c), V.A.P.C., *then prohibited,* at a hearing on the affidavit for the issuance of a search warrant, the Magistrate from ordering the particularly alleged offensive material to be produced by the *adverse party.* "The Magistrate's order as to notice and hearing shall give the adverse party the right appear and produce the matter described in the affidavit for a search warrant, *but shall not in any manner require him to produce the said matter.*" (Emphasis italicized).

Thus, what relevancy, to the hearing on the City's application for an injunction, the subpoena duces tecum had to the end result of the lawsuit escapes Counsel for the Amicus Curiae at the present time. To satisfy the curiosity of the City Attorney or the trial judge, perhaps, but for what purpose other than that? It was not necessary to produce the magazines in order to obtain the injunction. Was it in fact not for the laying of a predicate for future criminal action against McKelva? Can there be reached any other conclusion than that from this Record?

As recently as *Bray v. State,* 1972, Tex.Cr.App. 478 S.W.2d 89, the Court of Criminal Appeals of Texas emphasized that once a member of the bar undertakes to represent an accused, counsel is bound by all "fair and honorable means to present every defense that the law of the land permits, to the end that no person may be deprived of life or liberty but by due process of law."

Certainly it is clear in this case that Petitioner did not engage in any contumacious conduct or profane or disrespectful language in Court; Petitioner has not been and is not now accused of advancing some frivolous theory or objection.

In *MacInnis v. United States*, 191 F.2d 157 (9th Cir. 1951), that Court vehemently condemned the conduct of the attorney in addressing the Court and emphasized that counsel never has the right to let his temper, zeal, or intention lead him into disrespectful accusative language to the Court. Such conduct only acts to demoralize the authority of the trial court in the eyes of the jury and the public and it is the obligation of the trial court to maintain order and decorum in its presence. Such conduct was not present in this case.

In *Hallinan v. United States*, 182 F.2d 880 (9th Cir. 1950), the Court stated that a lawyer worth his salt has an obligation to utilize every legitimate effort in support of his client's cause and in so doing will be relieved from an improper contempt judgment.

In re Osborn, 344 F.2d, 611 (9th Cir. 1965), that Court condemned the attorney's refusal at trial to proceed with cross-examination when ordered to do so, but made it clear that the Court expected counsel to perform in a "fearless, vigorous and effective" manner while representing his client. The Court emphasized, however, that Osborn was at no time attempting to preserve any legal point or any legal contention; he simply refused to permit the trial court to run the court and made slight comments in this attempt.

In the case at bar, it is all too obvious that the course of action suggested by Petitioner had only one goal, that of preserving the client's Fifth Amendment rights against self-incrimination, which rights were vigorously and timely invoked by Petitioner at the commencement of the injunction hearing.

In *United States vs. Schiffer,* 351 F.2d, 91 (6th Cir. 1965), that Court considered and condemned the contemptuous remarks and charges directed at the trial court by counsel, and stated that while counsel had a right to forcefully present his claims to the court in order to obtain a ruling, even though the present conditions may be "far-fetched and untenable", counsel had no right to resist or insult the court after he had obtained a ruling. If counsel felt the ruling was erroneous, counsel had "an adequate remedy to review it by way of appeal". Schiffer, supra, at 94. As already stated, Petitioner in this case had no right of appeal but fully exposed his client to any repercussions which might evolve from the production of the documents.

While distinguishable in many respects, an analogous situation was presented in Appeal of *United States Security Exchange Commission,* 226 F.2d, 501 (6th Cir. 1955), wherein the Federal District Judge held in contempt of court the general counsel for declining to produce certain confidential intra-agency reports of the commission's investigation on the ground of the commission's rules of privilege. In setting aside the judgment of contempt, the Court stated in part that ". . . An attorney is entitled to consideration of a claim privilege not to disclose information which he honestly regards as confidential and should not stand in danger of imprisonment for asserting respectfully what he considers to be lawful rights". It is interesting to note that the general counsel asserted the privilege in his own behalf and the court upheld his right to do so; in the case at bar Petitioner advised and counseled his client who then asserted his privilege, and yet Petitioner was held in contempt.

In *Sacher v. United States,* 343 U.S. 1, 72 S.Ct. 451, 96 L.Ed 717 (1952), the Court spoke to the role and re-

sponsibilities of counsel at trial in protecting and preserving his client's rights:

> "Of course, it is the right of counsel for every litigant to press his claim, even if it appears far-fetched and untenable, to obtain the court's considered ruling. Full enjoyment of that right, would do allowance for the heat of controversy, will be protected by Apellant Courts when infringed by trial courts. But if the ruling is adverse, it is not counsel's right to resist it or to insult the judge—his right is only respectfully to preserve his point for appeal.
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> But that there may be no misunderstanding, we make clear that this court, if it's aid be needed, will unhesitatingly protect counsel in fearless, vigorous and effective performance of every duty pertaining to the office of the advocate on behalf of any person whatsoever. But it will not equate contempt with courage or insults with independence. It will also protect the processors of orderly trial, which is the supreme object of the lawyer's calling."

In *Walker et al. v. City of Birmingham,* 388 U.S. 307, 87 S.Ct. 184, 18 L.Ed.2d 1210 (1967), certain demonstrators had been enjoined from marching in the streets and notwithstanding the availability of the legal process to modify or set aside the injunction, it was ignored and deliberately defied. The judgment of contempt was upheld and in its opinion this Court emphasized that Petitioners had chosen to disregard the rule of law and ignore all legal procedures and instead carry their battle to the streets. In the case at bar, there was no appeal from an adverse judgment by the trial court and the client therefore faced the predicament of irretrievably waiving his rights by submitting to the subpoena Duces Tecum in delivering the

books in question in open court or asserting his constitutional rights based upon the Fifth Amendment in refusing to obey the mandate of the subpoena. There was no alternative to test the validity of the court order other than the election made by Petitioner's client in this case.

In re McConnell, 370 U.S. 230, 82 S.Ct. 1288, 8 L.Ed.2d 434 (1962), this Court set aside a judgment of contempt, holding that the remarks of counsel did not obstruct the court in the performance of it's judicial duty. This court emphasized in part that it is essential to the fair administration of justice that counsel be able to assert honest, good faith efforts to present their client's cases.

In re Marshall, 423 F.2d, 1130 (5th Cir. 1970), the Court noted that the power of holding an attorney in contempt is broad, certainly there are guidelines which should be taken into consideration. In contempt cases against lawyers the court stated that all of the evidence must be carefully examined in order to insure that there is "no undue interference with the attorney-client relationship". The Court cited the case of *Parmelee Transportation Company v. Keeshin* 294 F.2d, 310 (7th Cir. 1961) for the proposition that the contempt power must be invoked sparingly and only when clearly demonstrated that the conduct in question is contumacious and tends to bring the administration of justice into disrepute as opposed to a situation wherein counsel's conduct is that of a "determined level-headed practitioner who is acting respectfully to the court under considerable pressure in a lengthy and important trial". See also United States ex rel *Robson v. Malone*, 412 F.2d 848 (7th Cir. 1969).

In re Dellinger, 461 F.2d 389 (7th Cir. 1972), the Court recognized the delicate line to be drawn between

vigorous advocacy and obstruction of justice and the resulting chilling effect to effective advocacy in a client's behalf. The court emphasized that the line defied any strict delineation but did suggest that doubts should be resolved in the favor of advocacy in order to assure an unintimidated bar. See also United States ex rel *Robson v. Oliver,* 470 F.2d 10 (7th Cir. 1972).

Petitioner submits that any client is entitled to a counsel's independent evaluation of what legal course should be taken and followed by the client. If the rules adopted which permits counsel to be held in contempt of court for advising a client in a situation such as that faced in the case at bar with contempt of court for so much as suggesting the client assert his Fifth Amendment rights, counsel will be faced with the obvious predicament of a conflict of interest between the disposition of his client's case and the very real possibility of counsel himself being subjected to criminal contempt and its resultant penalties. Counsel would then face a choice between his own self interest and the best interests of his client. To place counsel in such a position is to effectively deny his client's right to the effective representation and counsel of his chosen lawyer as commanded by the Sixth Amendment. A concomitant effect is to destroy the confidential relationship between attorney and client.

Therefore, are not the answers to the questions concerning Petitioner's case covered by the due process clause of the Fourteenth Amendment to the Constitution of the United States? Is due process of law not violated by a contempt of court judgment which is not justified by the evidence? See *Holt v. Virginia,* 381 U.S. 131, 14 L.Ed. 290, 85 S.Ct. 1375 (1965); *Johnson v. Mississippi,*

403 U.S. 212, 29 L.Ed. 423, 91 S.Ct. 1778 (1971); and *Mayberry v. Pennsylvania*, 400 U.S. 455, 27 L.Ed. 532, 91 S.Ct. 499 (1970).

If there is a per se rule to be adopted from this case, then it should be that the mere giving of legal advice, by a licensed attorney at law, to his client, pursuant to the Sixth Amendment of the Constitution of the United States, and the client, by accepting the advice, invokes certain provisions of the Constitution of the United States, which, as a result thereof, may thwart a trial court's processes, can never be contemptuous conduct on the part of the Attorney at Law. To hold otherwise, it is submitted, a violation of due process of law, under the Fourteenth Amendment to the Constitution of the United States of America, will result and the right to counsel, both in the civil law as well as in the criminal law fields, will truly become an impotent legal right under the law.

CONCLUSION

Whether this Honorable Court adopts the rationale of Petitioner himself that, under the Fifth and Sixth Amendments to the Constitution of the United States, he is entitled to relief, or, whether the Court adopts the rationale of the Amicus Curiae, that under the due process clause of the Fourteenth Amendment the judgment of contempt is null and void, the judgment of contempt should be, nevertheless, in all things, reversed and Petitioner, MICHAEL ANTHONY MANESS, should in all things be Ordered discharged from the judgment of contempt and allowed to go hence, without further delay therefrom.

back to the private practice of law to give legal advice to those persons who come to him and seek same.

Respectfully submitted,

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CERTIFICATE

This is to certify, that I MARVIN O. TEAGUE, on this the _____ day of October, A.D. 1974, did deliver to HONORABLE JOHN L. HILL, Attorney General, State of Texas, at his usual place of business, Supreme Court Building, State Capitol, Austin, Texas, to the attention of Hon. Joe Dibrell, Assistant Attorney General, Attorney for Respondent, Hon. James R. Meyers, one (1) copy of said Brief for the Amicus Curiae, Texas Criminal Defense Lawyers Association, by depositing same in the United States Mail, certified return receipt requested.

MARVIN O. TEAGUE

CERTIFICATE

This is to certify, that I, MARVIN O. TEAGUE, on this the _____ day of October, A.D. 1974, did deliver to HON WILLIAM F. WALSH, 1955 Richmond Avenue, Houston, Texas 77006 and HON. STUART M. NELKIN, 4635 Southwest Freeway, Houston, Texas, 77027, Counsel for the Petitioner, one (1) copy of said Brief for the Amicus Curiae, Texas Criminal Defense Lawyers Association, by depositing same in the United States Mail, certified return receipt requested.

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